IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 389 OF 2004

WITH

CROSS OBJECTION STAMP NO. 12966 of 2005

The Oriental Insurance Co. Ltd. ..Appellants

versus

Smt. Reshma W/o. Mohammad Miya

& ors. ..Respondents

Mr. J. S. Chandnani for the Appellants.

Mr. K. K. Tated for the Respondents No.1.

Ms. M. Jain for Respondent Nos. 2 to 6.

CORAM : D. G. DESHPANDE,J.

DATE : 19TH JULY,2005

ORAL ORDER :

1. By consent of the parties the appeal and the cross objection are taken for admission and final hearing simultaneously.

2. The appeal is filed by the Insurance Company against the order passed by the M.A.C.T. Thane, by which compensation of Rs.3,80,000/- have been

awarded to the claimants. The claimants are the wife and children of the deceased who met with an accident. Their claim was allowed by the Tribunal partly and therefore the Insurance Company has filed this Appeal. At the same time, the claimants have also filed Cross Objections for enhancement of compensation on two grounds, viz. that the Tribunal awarded interest at the rate of 6% only, it should be 8% and secondly the multiplier which was applied by the Tribunal in this case was 13 and considering the age of the victim at the time of his death i.e. 35 years, counsel for the original claimants contends that multiplier, in any case, should not have been less than 16.

3. So far as the appellant is concerned, there is also an application filed by the Insurance Company - Appellant vide Civil Application No. 2561 of 2005 for permission to adduce documentary evidence, at this Appellate stage under Order XXI. By this application the Insurance Company produced on record certain documents and according to them these documents can change the very nature and foundation of the order passed against the Insurance Company.

4. Apart from this application, the counsel for the insurance company also tried to tender one more

additional document in the form of policy of insurance without there being any reference to the same in this application.

5. Both the moves of the Insurance Company to file documents at Appellate stage and to add to the list of documents at the last stage of hearing i.e. today, only were strongly opposed by the counsel for the respondents - claimants. He contended that the Insurance Company had appeared before the Tribunal. They had filed their written statement, they had ample opportunity to produce all the documents, they had cross examined the witness, they were directed and asked to produce documents but they either failed to produce documents or withheld the documents at the stage of trial and now they cannot be permitted to produce the documents at this stage belatedly.

6. Counsel for the appellants on the other hand contended that the documents could not be before the Tribunal on account of confusion between the investigator and the Advocate of the Insurance Company. I do not find any substance in the explanation which is tried to be given for not producing document before the Tribunal. Admittedly the case before the Tribunal was going on for three years. If at all on a particular date any confusion

was prevailing between the Investigator and the Advocate, other opportunities were available to the insurance company and their advocate to make their positions clear, but nothing was done for production of the documents inspite of notice. This is nothing but a total case of negligence and recklessness. If parties inspite of ample opportunity, inspite of realising its consequences of their inaction do not take proper steps to rectify their mistakes then at least in such a case, as this is, no indulgence can be shown. No case at all is made out for production of documents at appellate stage. Sub Rule (1)(b) of Rule 27 of Order 41 provide that if the court has refused to admit evidence that ought to have been admitted or the parties seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when decree was passed and thirdly the appellate court requires any documents to be produced.

7. The case tried to be made by the appellant does not fall in any of the three categories. This is not a case where the Tribunal has refused to admit documents. This is not a case where the appellant has exercised due diligence but this is a

case of total and complete negligence and carelessness on the part of the appellant. Neither the trial court is at fault nor the respondents were at fault if the appellants could not produce the documents. Therefore, the permission sought for by this application, cannot be granted. It has to be rejected.

8. So far as merits of the matter are concerned, it was tried to be urged by the counsel for the appellant that driver had a licence only for driving light motor vehicle, whereas the vehicle that was involved in the accident and driven by the driver was a heavy motor vehicle. My attention was drawn by the counsel for the appellant to the copy of registration certificate annexed with the application No. 2561 of 2005 was regarding the particulars of the vehicle insured, the weight is given in column No. 14 of the registration certificate, that weight is 3248 kgs. Counsel for the respondents immediately pointed out that if from the documents which are sought to be produced by the appellant, the weight is 3248 kgs. then the vehicle does not fall in the category of heavy vehicle and the entire contention of the appellant is liable to be rejected. Counsel for the appellant also when confronted with this, he tried to contend that issue does not arise because no evidence in this regard

was tendered by the insurance company before the Tribunal. When the application for additional documents cannot be allowed and entertained and when it is rejected by me above, it is not necessary to nor required to go through the documents nor it is proper to find out what the documents contend. Therefore, so far as evidence before the Tribunal is concerned, nothing was produced by the insurance company to show that the vehicle involved in the accident was a heavy motor vehicle. That was the only point urged. There is no substance, therefore the appeal is required to be dismissed.

9. So far as cross objection of the claimants is concerned, counsel for the original claimants stated that the trial court awarded interest at the rate of 6% per annum but that should have been at the rate of 8%. Second contention was that the Tribunal adopted multiplier of 13 and this is not a proper application of multiplier because the age of the victim at the time of accident was 35 years. Therefore, according to the counsel for the claimants the multiplier of 16, in any case, should have been adopted.

10. Counsel for the insurance company raised preliminary objection regarding the maintainability of the cross objection. He contended that the

appeal of the insurance company was not about the award of compensation about the liability and therefore it was an appeal with limited scope and as such cross objection was not maintainable. He relied upon two Judgments reported in **2000 ACJ 584 National Insurance Co. Ltd. vs. Beena Kumari and ors. and another judgment reported in 2000 ACJ 115 United India Insurance Co. Ltd. vs. Ganga Ram and others.** According to him in both the judgments the High Court of Himachal Pradesh taken a view that cross objections by claimant for enhancement are not maintainable.

11. So far as the case of United India Insurance Co. Ltd. is concerned, my attention was invited by the counsel for the insurance company to paragraph 16. The same is reproduced below:

> "For the reasons recorded above, the appeal of the appellant insurance company is accepted and the impugned award is set aside to the extent that the appellant insurance company is not liable to indemnify the owner (respondent No. 6) of the scooter in question for the compensation awarded to the claimants, who shall also be at liberty to execute the award against the driver of the scooter in question (respondent No.5). The

> cross objection filed by the claimants, however, are dismissed being without any merit. Even otherwise, the cross-objections are admittedly not maintainable in the appeal filed by the appellant insurance company. The parties are left to bear their own costs".

So far as the case of National Insurance Company is concerned, my attention was invited by the counsel for the appellant to paragraph 6. The same reads as under:

> "The cross-objections filed by the respondents - claimants are not maintainable in this appeal filed by the insurance company. Otherwise also, no fault can be found with the quantum of compensation determined by the Motor Accidents Claims Tribunal. In the result, both the appeal and the cross-objections are dismissed having no merit and the impugned award dated 29.5.1990, passed by the M.A.C.T., Bilaspur, is affirmed whereby an amount of Rs.1,32,600 along with interest at the rate of 12 per cent per annum, from the date of filing of the petition till the date of payment, has been awarded."

In both these appeals no provisions of the Civil Procedure Code is quoted, though in the head notes there is a reference to Order 41 Rule 22.

12. A bare reading of Order 41 Rule 22 will show that what is provided for by the Civil Procedure Code regarding filing of cross objection is exactly otherwise. Sub Rule (1) and explanation of Rule 22 of Order 41 and explanation, reads thus:

> "22. **Upon hearing, respondent may object to decree as if he had preferred separate appeal.-** (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross] to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further times as the Appellate court may see fit to allow.

> [Explanation.- A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the court on any other finding which is sufficient for the decision of the suit, the decree, is wholly or in part, in favour of that respondent.]"

It will be clear from the aforesaid provision that the respondent in an appeal can file cross objection to the decree which he can take by way of appeal. Therefore criteria is whether the respondent claimant had a right to file appeal for enhancement of compensation. If the answer is in the affirmative then Sub Rule (1) of Rule 22 gives him right to file cross objection in respect of enhancement of compensation awarded. Therefore, the provisions of Civil Procedure Code are absolutely clear. There is no bar under Rule 22 upon the rights of the respondents in filing cross objection. The right of the respondent extend to the entire decree i.e. whatever part of the decree they could have filed separate appeal can be made the subject matter of cross objection. This provision of Order

41 Rule 22 does not appear to have been brought to the notice of the Himachal Pradesh High Court in both these matters above. Therefore, those two judgments are of no help. the cross objection has to be held to be maintainable.

13. So far as merits of the matter are concerned, admittedly the age of the victim was 35 years and application of multiplier of 13 does not appear to be proper in the circumstances, but there is no other evidence brought on record by the insurance company that the deceased was suffering from any other infirmities or diseases. The multiplier of 16 appears to be proper, in the circumstances.

14. Second contention regarding interest is also required to be accepted. But counsel for Insurance company contended that at present the interest rate have been reduced by the Reserve Bank of India and the Supreme Court has taken note of this fact that can be taken into consideration by this court also. Therefore, I pass the following order:

ORDER

. Appeal of the Insurance Company is dismissed along with Civil Applications No. 863 of 2004 and

2561 of 2004.

. Cross objection of the claimants is partly allowed.

. The Insurance Company will be liable to pay interest at the rate of 8% from the date of the application till the date of the order of the Tribunal i.e. 5.11.2003 and 6% thereafter.

. Compensation awarded by the Tribunal stands enhanced from Rs.3,12,000/- to Rs.3,84,000/-, plus compensation awarded by the Tribunal under different heads i.e. Rs.10,000/- towards loss of estate, Rs.30,000/- towards loss of consortium, Rs.20,000/- for medical expenses and Rs.8,000/- towards funeral charges. Thus, the claimants are entitled to total compensation of Rs.4,52,000/-.

. Insurance company will also pay costs to the claimant in the cross objection.

. Respondent No.1 mother is permitted to withdraw 50% of the decretal amount receivable by her. Remaining 50% shall be invested by the Tribunal in such a way that when child becomes major he is able to get his share through his mother.

. Amount deposited by the insurance Company in this Court should be immediately transferred to the Tribunal.

. Certified copy expedited.

19.7.2005 (D.G. DESHPANDE, J.)